IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1668

CITY OF ST. LOUIS, a Municipal Corporation; CHARLES R. KAMPRAD, Fire Chief; R. ELLIOTT SCEARCE, Director of Personnel; JOSEPH W. CLARK, Director of Public Safety; and FRANK C. CUMMINGS, FRED GOULD and CHARLES MARINO, Members Civil Service Commission,
Petitioners,

v.

UNITED STATES OF AMERICA and FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

JACK L. KOEHR
City Counselor
JAMES J. GALLAGHER
Associate City Counselor
Room 314, City Hall
St. Louis, Missouri 63103
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions Cited

Other Materials Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

CITY OF ST. LOUIS, a Municipal Corporation; CHARLES R. KAMPRAD, Fire Chief; R. ELLIOTT SCEARCE, Director of Personnel; JOSEPH W. CLARK, Director of Public Safety; and FRANK C. CUMMINGS, FRED GOULD and CHARLES MARINO, Members Civil Service Commission,
Petitioners,

v.

UNITED STATES OF AMERICA and FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners, the City of St. Louis, a municipal corporation; Charles R. Kamprad, Fire Chief; R. Elliott Scearce, Director of Personnel; Joseph W. Clark, Director of Public Safety; and Frank C. Cummings, Fred Gould and Charles Marino, members of the Civil Service Commission of the City of St. Louis, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 2, 1977. Petition for Rehearing denied on February 25, 1977.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Missouri, Eastern Division, is reported at 410 F.Supp. 948 (1976) and is reprinted in the Appendix at pages A 1-A 36.

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 549 F.2d 506 (1977) and is reprinted in the Appendix at pages A 36-A 55.

The Order of the Court of Appeals denying petitioners' Petition for Rehearing is reprinted in the Appendix at page A 56.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 2, 1977. Thereafter, the timely Petition for Rehearing of the City of St. Louis, et al. was denied on February 25, 1977. Jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals, requiring the testing of all important job components, is in conflict with the EEOC Guidelines on Employee Selection Procedures and the principles of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Washington v. Davis*, 426 U.S. 229 (1976)?

2. Whether the decision of the Court of Appeals is in conflict with the standards on burden of proof established in *McDon-*

nell Douglas Corp. v. Green, 411 U.S. 792 (1973) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), since the petitioners offered substantial evidence of the business necessity and job relatedness of its test, and the respondents thereafter failed to offer any evidence that additional testing or other selection devices were available which did not have racially disparate effect?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Constitution of the United States involved herein:

Fourteenth Amendment:

> Section 1 . . . No State . . . shall deny to any person within its jurisdiction the equal protection of the laws. Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Sections of Title VII of the Civil Rights Act of 1964, as amended, involved are:

Section 703:

> (a) It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice • • • for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

Section 713(a):

The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title.

STATEMENT OF THE CASE

The City of St. Louis is a charter city existing under the laws and constitution of the State of Missouri. The individuals named as defendants in the original actions were all officials appointed to their respective offices in personnel and fire department positions. Since 1943, except for a limited number of positions, the employees of the City of St. Louis including all positions in the fire department are under a civil service system of appointment and promotion. For all positions in the fire department, promotion has been based upon ranking in exams, considered with the individual's number of years in service (experience and training) and his yearly service ratings.

In 1972, the provisions of Title VII of the Civil Rights Act were made applicable to municipalities, and in 1973 the City contracted with two independent professional psychologists to conduct job analyses and devise selection devices for all uniformed positions in the fire department. Dr. Lawrence O'Leary was responsible for all the officer positions, including the ranks of fire chief, deputy fire chief, battalion chief and fire captain.

The City of St. Louis proceeded to fill vacancies by promotions based upon rank achieved from a correlation of all factors used as part of the selection procedure, test scores, experience and training and service ratings.

The respondent F.I.R.E. (Firefighters Institute for Racial Equality) representing black minorities filed suit in early 1974, and several months later the United States of America filed its action. The cases were consolidated for purposes of trial. Individual white members of the fire department were permitted to intervene. They have filed their separate Petition for a Writ of Certiorari herein.

Although originally contested by plaintiff F.I.R.E., no issue remains involving the promotion of officers above the rank of fire captain.

The statistical results of the written examination for fire captain showed a racially disparate effect.

However, the City presented substantial, independent, expert evidence that the job analysis was professionally conducted and the test for fire captains was content valid within the EEOC Guidelines and the standards of the American Psychological Association for psychological tests.

The plaintiffs offered the testimony of an expert who attempted to rebut the City's evidence of validity and job relatedness. How-

ever, no evidence was offered by F.I.R.E. or the United States of America that other tests were available without a racially disparate effect and which would serve the purpose of selecting qualified persons for promotion to fire captain.

All of the major job components determined by the job analysis for the position of fire captain were tested by the promotional exam except that of supervisory ability. The City's expert testified that it would be difficult to determine an individual's supervisory ability in a written examination and proposed to test this factor by performance ratings during a probationary or working test period. The plaintiff's expert confirmed that supervisory ability generally should not be tested by a written exam. Both experts testified that a method known as the "assessment center" could be used for this purpose. This City's expert was familiar with this method and had used it to evaluate individuals for promotion to fire chief and deputy fire chief in the City of St. Louis but not for the positions of battalion chief or fire captain. It was an expensive and time consuming method. Since only 18 persons could expect to be promoted out of 450 who took the exam it was not recommended for the fire captain exam. There was no evidence that it had a less disparate effect.[1]

a) Opinion of the District Court

The District Court in its opinion (*United States of America v. City of St. Louis, et al.*, and *Firefighters Institute for Racial Equality v. City of St. Louis, et al.*, 410 F.Supp. 948) found that the written exam for fire captain was job related and content valid although it had statistically significant disparate effect on

---

[1] An action is now pending in the United States District Court for the Eastern District of Virginia wherein the "assessment center," used for fire department promotions, had a racially disparate effect. *Roscoe Friend, et al. v. City of Richmond, et al.*, Civil Action No. 74-0327R, Eastern District of Virginia, Richmond Division.

blacks. The Court examined the various alternative methods, including the assessment center, suggested by the Guidelines and the plaintiff's expert and found them not feasible under the factual circumstances of this case. (410 F.Supp. 948, 957) A. p. 18 The Court further concluded that supervisory skills could be more adequately evaluated during a working test period (410 F.Supp. 948, 959) A. p. 21 and concluded that the deferred testing of this component did not invalidate the exam.

Other issues were resolved by the District Court and it found no evidence of disparate impact in regard to the exams for fire chief, deputy fire chief and battalion chief. (410 F.Supp. 948, 959) A. p. 22 It denied the claims of several individual black firefighters, requested that the defendants do all they could to eradicate private discrimination in so-called supper clubs in fire houses and finally resolved an issue with regard to certain language in the Partial Consent Decree. (410 F.Supp. 948, 960) A. p. 23

b) **Opinion of the Court of Appeals**

The Court of Appeals agreed that a content valid test, such as the fire captain's exam, could be used as a selection device. (*Firefighters Institute for Racial Equality, et al. v. City of St. Louis, et al.*, 549 F.2d 506, 511, 1977) A. p. 43 The Court further agreed that the job analysis performed by the City was thorough and complete (549 F.2d 506, 511) A. p. 44 and that the exam questions were not so flawed as to render the test invalid. (549 F.2d 506, 514) A. p. 49

However, the Court of Appeals ruled that the job component of supervisory ability should have been tested at the time of the principal exam and not deferred for testing in the working test or probationary period. The Court reasoned that this

was required by the EEOC Guidelines and Circuit Court of Appeals decision in similar cases. (549 F.2d 506, 512) A. p. 45 No United States Supreme Court decisions were cited as authority for its opinion.

The Court of Appeals affirmed the decision of the District Court with regard to testing for other officer positions and with regard to the claim of racial discrimination by the individual plaintiffs. The Court further ordered specific action concerning the use of City facilities for supper clubs.

The issues presented in this Petition for a Writ of Certiorari relate only to the fire captain's exam.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals, Requiring the Testing of All Important Job Components, Is in Conflict With the EEOC Guidelines on Employees Selection Procedures and the Principles of Griggs v. Duke Power Company, and Washington v. Davis.

The issues raised by this appeal present unanswered questions of national interest for all employers and are particularly pertinent for government bodies or agencies under a civil service or merit system which attempt to establish an objective means of determining the qualifications and capabilities of prospective employees and officers.

A. The law under Title VII of the Civil Rights Act of 1964, made applicable to municipal corporations in 1972 (Section 701(a) and (b); Title 42 § 2000e (a) and (b)) contains little or no guidance as to the details of its application. In broad terms it prohibits as "an unlawful employment practice" (Section 703 (a)(1) and (2)) and action by an employer which discriminates by race in hiring, discharging or classifying an employee or which tends "to deprive any individual of employment opportunities" because of race.

It was apparent to Congress that this sweeping language would have an effect on the use of selection devices in personnel practices and, therefore, a specific exemption was established in the law:

> "(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such

> test * * * is not designed, intended or use to discriminate because of race * * *."[2] Title VII, Section 703(h)

It is, therefore, the express intent of Congress to permit the use of tests by employers in order that hiring may be accomplished on the basis of job qualifications rather than race or color. *Griggs v. Duke Power Company*, 401 U.S. 424, 434 (1971). It is required only that such tests be "professionally developed." Other specific qualifications are not imposed and it is submitted that the opinion of the Court of Appeals has no support in the language of Title VII.

B. Congress did provide the EEOC with authority to issue "suitable procedural regulations" to carry out the provisions of Title VII. (Section 713(a)) It is recognized by this Court that Congress did not confer authority on the EEOC to promulgate administrative rules and rules under Title VII. *General Electric Company v. Gilbert*, 429 U.S. 125, 50 L.Ed.2d 343, 357 (1976), citing *Albemarle Paper Company v. Moody*, 422 U.S. 405, 431 (1975), and the courts may, therefore, accord less weight to such guidelines. *Standard Oil v. Johnson*, 316 U.S. 481, 484 (1942), cited in *General Electric Company v. Gilbert*, 429 U.S. 125, 50 L.Ed.2d 343, 357 (1976).[3]

There is also unresolved conflict between federal agencies which have overlapping responsibilities for fairness in employee selection. In 1972 an amendment to Title VII, Section 715 created the Equal Employment Opportunity Coordinating Coun-

---

[2] There was no evidence in the District Court that the City intentionally "designed, intended or used" the test to discriminate because of race. To the contrary, a computer item analysis of test questions was performed in an attempt to find and eliminate factors of racial bias.

[3] The deference accorded by this Court to the EEOC Guidelines has steadily diminished from a position of "great deference" in the unanimous decision of *Griggs v. Duke Power Company*, 401 U.S. 424, 434 (1971) to that expressed in *General Electric Company v. Gilbert* case.

cil (EEOC). An attempt was made to develop a uniform set of guidelines on employee selection. All federal agencies except the EEOC have now agreed on a set of Uniform Guidelines. 41 Federal Register 29016, July 14, 1976. These differ in many important aspects from the EEOC Guidelines which were republished, unchanged in November, 1976. 41 Federal Register 51984.

It is within the context of these multiple judicial and agency standards that an employer, such as the City of St. Louis, must attempt the development of employee selection devices. However, the City of St. Louis submits that it has complied and that the Court of Appeals erred in its application of the guidelines. It ruled that the "fatal flaw" in the City's exam was that the component of supervisory ability was not tested and, therefore, the selection device was not "content valid." The EEOC Guidelines on this subject state:

> "* * * Evidence of content validity done may be acceptable for well-developed tests that consist of suitable samples of the essential knowledges, skills or behaviors composing the job in question. * * *" EEOC Guidelines, Section 1607.5(a).

This same guideline endorses the "Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association which in part provide:

> "An employer cannot justify an employment test on the grounds of content validity if he cannot demonstrate that the content universe includes *all, or nearly all,* important parts of the job." (Court of Appeals, A. p. 45, emphasis in Court's (opinion.) 549 F.2d 506, 512.

The Court of Appeals ruled, as a matter of law, that *all* important components in a job must be tested in order for a selection device to be content valid, in spite of the fact that:

a.) No such requirement may be found in the language or intent of Title VII of the Civil Rights Act of 1964 as amended;

b.) It is contrary to the express language of the APA Standards endorsed in the EEOC Guidelines;

c.) It disregards the professional evidence from both parties in the trial which indicated that this factor cannot be properly evaluated in a paper and pencil test;

d.) Is wholly unsupported by any evidence that the additional testing will be without a disparate effect or will reduce the disparate effect of the general exam;

e.) Is contrary to the principles and direction of United States Supreme Court decisions on the related subject.

C. This Court has dealt with the question of employee selection devices in decisions starting with *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). The Court in *Griggs* required employers to show that tests to be used were job related. *Griggs*, supra, page 432. The gravamen of the *Griggs* case involved the use of standardized tests for which there had been no job anaylsis performed. The unanimous decision of this Court held that Congress had not forbidden the use of testing procedures but that Congress required that such tests measure the "person for the job and not the person in the abstract." *Griggs*, supra, page 436.

Thereafter, in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), this Court noted the *Griggs* case and indicated that it was an opinion regarding testing devices which are "artificial, arbitrary and unnecessary barriers to employment" which Congress had intended to remove. *McDonnell Douglas Corp., supra*, page 806.

Several years later, in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), this Court again reinforced its decision

that a test must be job related in order to qualify as a selection device. The use of standardized tests was again examined and found wanting primarily because of the fact that the general ability tests used were not clearly job related. *Albemarle Paper Company* case, 422 U.S. 405, page 431 through page 435.

Most recently, this Court again turned its attention to this issue and in *Washington v. Davis*, 426 U.S. 229 (1976), this Court decided that a written personnel test used by the District of Columbia for police department recruits was valid. In *Washington v. Davis*, after deciding the constitutional standards of proof for an action under Title 42, Section 1981, this Court determined that a selection device which correlated with training course scores was job related. This Court was also of the opinion that there was no single method for validating employment tests. *Washington v. Davis*, 426 U.S. 229, 250-252.

Although it does not rule on the specific question in this appeal, this opinion clearly indicates the "more sensible construction of the job relatedness requirement" (*Washington*, supra, page 251), and signals to the Federal Judiciary the need to avoid excessive, unnecessary requirements for the validation of testing procedures which frustrate the development and use of any reasonable psychological test.

These decisions of this United States Supreme Court all indicate a reasonable and moderate approach to problems involved in the preparation and issuance of selection devices. The Court of Appeals by its decision in this matter orders a procedure far in excess of the professional guidelines and the decisions of this Court.

II. The Decision of the Court of Appeals Is in Conflict With the Standards on Burden of Proof Established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), Since the Petitioners Offered Substantial Evidence of the Business Necessity and Job Relatedness of Its Test, and the Respondents Thereafter Failed to Offer Any Evidence That Additional Testing or Other Selection Devices Were Available Which Did Not Have Racially Disparate Effect.

Title VII laws set no standards allocating the burden of proof in an action involving the theory of disparate impact. This Court provided guidance in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), involving a private, non-class-action, claim for an individual. The procedure was applied to a testing procedure in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 525 (1975). The employer has the burden of showing its tests are job related after the plaintiff establishes a prima facie case of discrimination. Thereafter, the burden devolves upon the plaintiff to show that other tests are available which will serve the business interests of the employer without a disparate impact.

The Court in *Albemarle* notes that the "concept of job relatedness takes on meaning from the facts of the *Griggs* case." *Albemarle*, supra, p. [illegible]. Evident in *Griggs* that the standardized tests were not job related or that a job analysis had even been performed. Under these circumstances the burden cannot shift.

Contrast this with the facts in the present case. The City of St. Louis presented substantial, independent, professional testimony and documentary evidence as to the validity of the job analysis (found to be "thorough and complete" by the Court of Appeals) and that the test was job related. The Court of

Appeals did not rule that what was tested is not job related.[4] The Court of Appeals does *not* rule that listed job components should not have been tested, or that they were improperly tested, or that they do not have a manifest relationship to job of fire captain. Their importance is confirmed bp the fact that the Court of Appeals upheld the job analysis.

With this affirmed substantial job related evidence offered by the City of St. Louis, the burden should have shifted to the plaintiffs, as is required in the *McDonnell* and *Albemarle* decisions, to produce evidence of reasonable non-discriminatory alternatives. There was absolutely no attempt at such evidence. The plaintiffs were content to reply on their prima facie case.

There is confusion and important differences among the reported District Court and Circuit Court of Appeals on this general question. Some indicate that the defendant's burden is a heavy one,[5] while others state that what shifts is the burden of going forward with the evidence.[6] Clarification is obviously needed. But in any event the City of St. Louis submits that it has complied with its burden as defined by this Court.

---

[4] The exam had tested the components of fire fighting, in service training, and inspection-prevention which were ranked in importance as 1, 2 and 3 respectively. Supervision ranked 4th in importance. The Content Validation of Test for Fire Captain—City of St. Louis, Appendix B. Defendant's Trial Exhibit A.

[5] See *Kirkland v. New York St. Dept. of Correctional Servs.*, 520 F.2d 420, 426, 11 FEP 38, 42 (2d Cir. 1975); *Officers for Justice v. Civil Service Comm'n.*, 395 F.Supp. 378, 380, 11 FEP 815, 819 (N.D. Cal. 1975).

[6] See *United States v. Hayes Int'l. Corp.*, 456 F.2d 112, 120, 4 FEP 411, 418 (5th Cir. 1972); *Kaplan v. IATSE*, 525 F.2d 1354, 1358, 11 FEP 872, 875 (9th Cir. 1975) ("the burden of going forward and the burden of persuasion" are shifted); *Afro-American Patrolmen's League v. Duck*, 366 F.Supp. 1095, 1099, 1100, 8 FEP 22, 24 (N.D. Ohio 1973), aff'd, 503 F.2d 294, 8 FEP 1124 (6th Cir. 1974).

This issue as to the standards of burden of proof is in addition to the questions of standards under the Fourteenth Amendment for cases under Title VII that are in issue in the appeal of *Hazelwood School District v. United States*, U.S. Supreme Court No. 76-255 and as presented by the intervenors in their Petition for a Writ of Certiorari in this cause.

CONCLUSION

For the stated reasons, this petition for writ of certiorari should be granted.

JACK L. KOEHR,
City Counselor

JAMES J. GALLAGHER
Associate City Counselor

Room 314, City Hall
St. Louis, Missouri 63103
314-453-3361

Attorneys for Petitioners

APPENDIX

APPENDIX 1

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-200 C (4)

Firefighters Institute for Racial Equality, et al.,
Plaintiffs,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-30 C (4)

Order

(Filed April 9, 1976)

Pursuant to the memorandum filed this date.

It Is Hereby Ordered, Adjudged, and Decreed that defendants shall have judgment against plaintiffs, and that these causes be and are dismissed at plaintiffs' costs.

/s JOHN F. NANGLE
United States District Judge

Dated: April 9, 1976.

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 74-200 C (4)
Firefighters Institute for Racial Equality, et al., Plaintiffs, vs. City of St. Louis, et al., Defendants.	No. 74-30 C (4)

Memorandum

(Filed April 9, 1976)

Plaintiffs brought these actions pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. §§ 1981 and 1983.

These cases were tried before the Court sitting without a jury. The Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the stipulations of the parties, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiff, Firefighters Institute for Racial Equality, Inc. is a not-for-profit corporation, organized under the laws of the State of Missouri. Plaintiff, Preston Sims, is a black citizen of the United States, resident of the City of St. Louis, Missouri. Plaintiff Sims was denied employment by the Fire Department, based in part at least upon his failure to pass a written test which was given as a prerequisite for employment by the St. Louis Fire Department. Plaintiff, George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, and Eugene Stanton are all black citizens of the United States, and residents of the City of St. Louis. All are presently employed by the St. Louis Fire Department. The Attorney General has brought suit on behalf of the United States.

2. Defendant City of St. Louis is a municipality incorporated pursuant to the laws of the State of Missouri and is a political subdivision of that State. Defendant Division of Fire and Fire Prevention is one division within the Department of Public Safety of the City of St. Louis. It operates all firefighting facilities of the City of St. Louis. Defendant Frank C. Cummings is the Acting Chairman of the Civil Service Commission of St. Louis. Defendants Fred Gould and Charles Marino are members of the Civil Service Commission. Defendant Joseph B. Clark is the Director of the Department of Public Safety of the City of St. Louis. Defendant Charles Kamprad is the successor to the originally named defendant Denis Broderick, who subsequently retired as Chief of the Fire Department. Defendant R. Elliott Scearce is the Director of the Department of Personnel for the City of St. Louis, responsible for establishing eligibility lists for employment and promotion by the Fire Department.

3. Intervenor Michael Davis is a non-black employee of the City of St. Louis who has applied for employment with the St. Louis Fire Department. He has a position on both the promotional hiring list and the open competitive hiring list. Intervenors Edwin David Banta and George Hohman are members of a class of 177 non-black firefighters, all of whom have undergone testing for evaluation and promotion to the rank of Fire Captain and all of whom are on the current eligibility list for such promotion. Intervenors Donald Blackwell, Nick Altmeyer and George Tschlis are members of a class of 100 non-black Fire Captains, all of whom have undergone testing and evaluation for promotion to the rank of Battalion Chief and all of whom are on the current eligibility list for such promotion.

4. The Fire Department of the City of St. Louis is a division of the Department of Public Safety of the City of St. Louis. The Director of the Department of Public Safety, Mr. Joseph B. Clark, is an appointee of the Mayor. The Fire Chief is responsible to the Director of the Department of Public Safety. The Fire Chief is responsible for the day-to-day operation and policies of the department. Under the Fire Chief are the Deputy Fire Chiefs, responsible for the management of the department in its day-to-day functions. The Deputy Fire Chiefs each supervise one-third of the Fire Department's personnel, as each is assigned to one of the three shifts. The Deputy Fire Chiefs respond to any and all major alarms of fire. The City of St. Louis is divided, for the purposes of the Fire Department, into seven districts. In charge of each district is the Battalion Chief, who reports to the Deputy Fire Chief. The Battalion Chief has supervision over approximately eight companies, the number varying depending upon the size and fire hazards within each district. The Battalion Chief is responsible for the companies, including the men, officers, equipment, houses, and the fire safety of the individuals and property located within the district. The Fire Captain serves below the Battalion Chief. The Fire Captains

work in shifts and are responsible for the men and equipment under their supervision. The Fire Captain is also responsible for the training of individuals under his supervision.

5. The rank structure of uniformed personnel in the St. Louis Fire Department, in ascending order of rank, is Firefighter, Fire Captain, Battalion Chief, Deputy Chief, and Fire Chief.

6. As of November 30, 1974, there were approximately 1,000 uniformed personnel employed in the St. Louis Fire Department, of whom approximately 110 (11%) were black.

7. Applicants for the entry level position of firefighter are required to be residents of the City of St. Louis on their date of application.

8. On November 30, 1974, there were approximately 180 persons in the rank of Fire Captain, of whom 4 (2.2%) were black. No black has ever held a uniformed position in the Fire Department above the rank of Fire Captain.

9. In the period since November 30, 1964, 95 whites and 1 black have been promoted to the position of Fire Captain. The black was Daniel Austin, promoted to Fire Captain on May 22, 1966.

10. Pursuant to the provisions of the City Charter, appointments to the entry level position of Firefighter, and promotions to higher positions within the Fire Department, are made from eligibility lists prepared by the Personnel Department of the City of St. Louis. The Personnel Department, in response to a requisition for personnel made by the Fire Department and approved by the Director of Public Safety and the Budget Department, certifies to the Fire Department, in order of rank from the appropriate eligibility list, a number of persons equal to the number of vacancies to be filled, plus two. The Fire De-

partment then appoints from those certified the persons it wishes to fill the vacancies.

11. In certifying persons for the entry level position of Firefighter, the Personnel Department first certifies, in order of rank, persons from an eligibility list of qualified applicants who are then permanent city employees (the promotional list). After that list is exhausted, certification is made in order of rank from a list of all other qualified applicants (the open competitive list).

12. An eligibility list expires two years from the date it is established, or when it is pre-empted, whichever is sooner. In the period since November 1, 1964, eligibility lists for the entry level position of Firefighter were established on October 15, 1974; September 28, 1971; March 6, 1969; October 31, 1966; and November 6, 1964. Since January 1, 1962, eligibility lists for the position of Fire Captain have been established in 1962, 1964, 1967, 1969, 1971, and 1974. Eligibility tests for the rank of Battalion Chief were established in 1967, 1969, 1971, and 1974.

Entry Level Positions

13. All persons appointed to the entry level position of Firefighter are required to complete successfully a probationary period of up to one year, including an initial training course in firefighting. Of the 307 persons appointed to the entry position of Firefighter since November 30, 1964, 3 have been terminated for inability to perform satisfactorily the duties of a Firefighter.

14. In 1969 ranking on the open competitive eligibility list was based on the applicant's scores on a written test, a physical strength and agility test and an evaluation of the applicant's experience and education. Minimum passing scores were established for the written and physical tests. Those attaining pass-

ing scores on the written and physical tests were ranked on the eligibility list, with the results weighed as follows: 50% on the written test; 35% on the physical test; and 15% on the education and experience evaluation.

15. In 1971 and 1974, ranking on the open competitive eligibility list was based on the applicant's score on a written test and on a physical strength and agility test, with a minimum passing score established for each test. The results of each test were weighed 50% in the ranking.

16. The mean scores for blacks and whites on the written examination for the entry level position utilized in 1974 were approximately 56.70 and 71.95 respectively. The approximate mean scores attained by blacks and whites on the physical agility test administered in 1974 were 51.24 and 49.13 respectively.

17. Seven Hundred thirty-four persons took the written test for the entry level position in 1974, of whom 267 (36.4%) were black. The cut-off score utilized in 1974 for placement on the eligibility list eliminated approximately 51% of the black applicants and 25% of the white applicants who took the two examinations.

18. The current promotional and open competitive eligibility lists contain 26 and 360 names, respectively. Eight (30.8%) of the 26 persons on the promotional list are black. Eighty-one (24.3%) of the 334 persons on the open competitive list (not counting those persons also on the promotional list) are black, including 10 (10%) of the first 100 persons.

19. On June 16, 1975, the parties agreed, with the consent of the Court, to allow the City of St. Louis, its officers and agents, to proceed with the hiring of individuals for the entry level position in accordance with the terms of a "Partial Consent Decree" which is incorporated herein. See Appendix A.

Fire Captain Position

20. For the examinations for the position of Fire Captain, for the eligibility lists established in 1962 through 1965, and in 1974, applicants were required to have served at least five years in the position of Firefighter or above. For the examinations for the position for the lists established in 1967 through 1971, applicants were required to have served seven years in the position of Firefighter or above. The increase in the required number of years of service from five to seven years was made on the recommendation of an outside consultant hired by the Fire Department. The decrease for the 1974 eligibility list from seven to five years required service was also made on the advice of an outside consultant.

21. From 1962 through 1971, ranking on the eligibility list for Fire Captain was determined by a written test, an experience and training score, and a service rating. These scores were weighed as follows: 45% on the written test; 40% on the experience and training score; and 15% on the service rating.

22. Ranking on the eligibility list for Fire Captain for 1974 was determined as follows: written test score weighed 45%; experience and training score weighed 45% and service rating weighed 10%.

23. Applicants for the position of Fire Captain were required to meet minimum requirements for experience and service ratings, and achieve a minimum passing score on the written examination in order to be ranked on the eligibility list.

24. The experience and training score of the applicants in 1970 and 1974 was determined by the positions held in the Fire Department in the ten years preceding the application. Points in the final ranking were awarded for each month of experience. In 1974, all applicants with ten or more years

experience received 45 points. Applicants with the lowest experience and training score received 31.5 points. One hundred fifty-four (81%) of the 189 persons on the 1974 eligibility list for Fire Captain received the maximum 45 points for experience and training.

25. The service rating score for applicants in 1971 and 1974 was based on the last supervisory rating received by the applicant prior to the cut-off date on the examination announcement. Applicants who made the minimum scores on the other parts of the examination for the position of Fire Captain received from seven to ten points for service ratings in the final ranking on the eligibility list. One hundred seventy-six persons (93%) of the total 189 persons ranked on the 1974 eligibility list received between 7.8 and 9.2 points for service ratings.

26. The mean scores for black and white applicants on the written test for Fire Captain in 1974 were 69.72 and 76.59 respectively. Forty-seven blacks and 406 whites took the 1974 written examination. Twelve blacks and 177 whites achieved a passing score on the examination. Twelve of the 189 persons (6.3%) on the current eligibility list for Fire Captain are black, with the highest ranked black on the list ranked at number 55.

27. Only approximately 18 persons will be promoted from the 1974 eligibility list.

Battalion Chief

28. For the examination for Battalion Chief for the eligibility lists established in 1962 through 1965, and in 1974, applicants were required to have served at least five years in the position of Fire Captain or above. For the examination for Battalion Chief for the eligibility list established in 1967 through 1971, applicants were required to have served at least eight years in the position of Fire Captain or above.

29. As stated above, there are currently only 4 black Fire Captains. Of the 3 black Fire Captains who took the 1974 Battalion Chief Exam, 2 passed. One of those two has a sufficiently high ranking that appointment is possible. An adverse impact on blacks has not been established.

Deputy Chief and Fire Chief

30. There is simply no evidence from which to conclude that the examinations for these positions have an adverse impact on blacks.

31. Plaintiffs oppose the time-in-grade requirement for these positions. Although time-in-grade requirements have been increased in the past, they have been lowered to the original requirement in the recent past. Any adverse impact suffered from the increase is no longer in existence.

Selection Procedure

32. It is clear that the differences found in performance by blacks and whites on the Firefighter written examination and the Fire Captain examination are statistically significant.

33. Prior to the effective date of Title VII, as amended to include state and local governments (March 24, 1972), the City of St. Louis made no attempt to validate any of the written tests or other standards or requirements utilized in the selection of persons for entry level or promotional positions in the St. Louis Fire Department.

34. In the spring of 1973, the City of St. Louis hired an outside consultant, Dr. Lawrence O'Leary, to develop a proper selection device.

35. Dr. O'Leary's report indicates that the content validation approach was used in devising the selection procedure because (a) the possibility of collusion by applicants existed, making the use of an identical test from year to year undesirable; and (b) because the number of promotions per eligibility list is small, it would be difficult to rely on evidence of a predictive nature derived from small samples. In addition, the lack of valid criteria for work performance precluded the use of a criterion related validity study.

36. Dr. O'Leary proceeded to conduct a job analysis for the position of Fire Captain and Battalion Chief. The methods used for the analysis of the two jobs were essentially the same. Captains, and Battalion Chiefs, were selected at random from each of the districts. Lengthy interviews of up to two hours were conducted. Twenty-seven Fire Captains were interviewed as was one Battalion Chief from each district.

37. The interviews asked for a complete specification of all components of the job, critical incidents, and qualities considered to be necessary or desirable for satisfactory performance of the job. The information obtained was then summarized by tabulating the number of times each different component was mentioned; its ranking in importance by each person interviewed; and the percentage of time spent on each component.

38. Dr. O'Leary made a decision to increase the length of the Fire Captain's examination, from 100 to 125 questions, to achieve higher reliability. He also decided not to measure skills, abilities and personal characteristics, but only the knowledge required for the job. This decision was made because of the undesirability of measuring such items in a paper-and-pencil test.

39. Questions on the examinations were distributed among the knowledge areas required, in accordance with the areas'

importance. Questions from which the test was constructed were obtained from the test exchange service of the International Governmental Personnel Management Association from questions constructed specifically for the tests by researchers. Questions were checked for their applicability to the City of St. Louis. The best questions were selected. These questions were then shown to the Fire Chief and a Deputy Fire Chief for their approval. The questions were selected after passing the following criteria:

a) approved by at least two members of the three-man validation task force as job related;

b) acknowledged to be job related by an expert panel of technical advisors from the Fire Department;

c) judged to have the least number of words necessary to successfully convey the meaning of the question.

The last criteria resulted from a determination that in prior examinations, minority candidates had difficulty with the longer questions.

40. Dr. O'Leary suggested that supervisory skills, which could not feasibly be included in a written examination, be tested during the working test period.

41. Dr. O'Leary recommended a range within which to establish a cut-off score. The cut-off score chosen, 78, was within the range.

42. Of the 189 persons on the eligibility lists, only a small fraction will actually be appointed during the life of the list.

43. Another possible method of testing for promotions is the Assessment Center approach. Because of the large number of candidates, however, the costs of utilizing such an approach would be prohibitive. The estimated cost was $500.00 per candidate.

44. Dr. Richard Barrett, plaintiffs' expert, raised various criticisms of the examination. Dr. Barrett, however, had never performed a content validity study for a fire department, had not made any study of the knowledge and skill required for the jobs of Fire Captain and Battalion Chief, and had not even studied any manuals relating to the skills and knowledge needed. Dr. Barrett approved of the use of the working test period and service ratings. He conceded that budgetary considerations would have to be given weight in devising a selection procedure. Although critical of 10 of the 125 questions, Dr. Barrett stated that not every question on the examination needed to be content valid for the test itself to be valid. He further conceded that there had never been a perfect examination.

45. While the Court is aware of Dr. Barrett's credentials in the field, the Court concludes that his opinions herein are not entitled to credence. He was not at all familiar with the jobs involved. His criticisms of the examination amounted to no more than nit-picking. Dr. Barrett was critical of only a small portion of the examination and yet was of the belief that not every question needed be valid in order for the test itself to have validity. His conclusion, that the examination lacked validity, was not supported even by his own testimony. In sum, Dr. Barrett was not an impressive witness herein.

Supper Clubs

46. The evidence establishes that Fire Department personnel have established supper clubs on a very informal basis for the benefit of club members, at the various firehouses. There is no evidence tying or connecting any one club with any other. The members contribute money for the expenses of utensils and food. One member is the cook, who has the discretion and authority to determine who is a member of the club.

47. The cooking facilities themselves belong to the Fire Department. The utensils, however, are the property of the supper clubs.

48. There is evidence that blacks have been excluded from many of these clubs. There is no evidence, however, to indicate that the exclusions were anything more than the individual decisions of some white firemen not to dine with black firemen; these decisions were not the result of any Fire Department directive or order. These exclusions frequently result in blacks, where a minority in a firehouse, cooking and eating apart from their white associates.[1]

49. The problem created by the supper club obviously exacerbates racial tensions and as such, runs counter to the policies of the laws of this country. Yet should a federal court issue some type of mandatory order to each firehouse setting out regulations relating to buying food, preparing it, serving it and eating it? The answer seems obvious. The Director of Public Welfare, Joseph Clark, testified that the problems with the supper clubs were coming under control. Mr. Clark, who himself is black, pledged all his efforts to eradicate this reprehensible practice from the St. Louis Fire Department. This Court believes that, at this time, it is inadvisable to involve itself in these supper clubs. In the event that this problem persists and remains without improvement six months from this date, the Court will reconsider this issue and seek specific proposals from city officials and the parties.

Overt Discrimination

50. George Horne applied for, and was examined for, promotion to the position of Fire Captain in 1969. After the ex-

---

[1] This type of separation is both offensive and incomprehensible in groups whose very survival depends upon togetherness.

amination, he was ranked twenty-first on the 1969 elegibility list.

51. In the spring of 1971, the Director of Public Safety met with officials of the local firefighters union, and agreed to end the delay in filling Fire Captain vacancies.

52. Thomas Vetter, a vice-president of the union, surveyed the Fire Department for vacancies. He found that six vacancies existed and so notified Horne of this fact by a letter postmarked August 13, 1971. At that time, Horne was sixth on the list.

53. Alfred Newman, a Deputy Chief of the Fire Department told Horne that he would speak with the Fire Chief concerning an appointment to Fire Captain.

54. On August 31, 1971, the Department issued a requisition for only four Fire Captains. Therefore, Horne was not appointed. Shortly thereafter, the 1969 eligibility list expired.

55. On December 13, 1971, the Fire Department issued a requisition for four Captains to be appointed from the 1971 eligibility list. That requisition form indicates that two of the positions as Fire Captains had been vacated by death and resignation on September 21, 1971 and July 17, 1971 respectively.

56. The Court is unable to find that Horne was denied promotion because of his race. The requisition form is signed by Denis Broderick, who was the Fire Chief and appointing authority. There is no indication in the record that either Thomas Vetter, a union official or Alfred Newman, a Deputy Fire Chief, had the authority to determine the necessary number of Fire Captains, and requisition the same. Nor does there appear to be a requirement that all vacancies in a position be filled as soon as they appear. Budgetary considerations could well have forced the Fire Chief, assuming that there were in fact six vacancies, to request only four appointments. There is no evidence from

which to conclude that the Fire Chief confirmed the fact of six vacancies. Under these circumstances, the Court can not find that Horne was denied promotion because of his race.

57. There is absolutely no evidence from which to conclude that Preston Sims was denied employment because of his race.

CONCLUSIONS OF LAW

This Court has jurisdiction over the subject matter and of the parties to this action. Defendants' and intervenors' objections to the presence of the United States as plaintiff herein are without merit. See 42 U.S.C. § 200e-5(f)(1).

As has been frequently stated, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*,

> . . . proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a *reasonable* measure of job performance. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971) (emphasis added).

The statistical evidence presented establishes that the tests involved had a disparate impact on blacks. Accordingly, the defendant City must establish that the tests are a "reasonable measure of job performance". See also, *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (means of selection must be substantially related to job performance); *Castro v. Beecher*,

459 F.2d 725 (1st Cir. 1972) (there must be a fit between the qualifications and the job); *Douglas v. Hampton*, 512 F.2d 976 (D.C.Cir. 1975) (the test must bear a demonstrable relationship to successful job performance); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973) (manifest relationship between the test and the job is required).

There are various means of establishing the relationship between the examination and job performance.

> The preferred method of test validation is criterion-related or empirical validity, which includes what are referred to as the predictive and concurrent methods of validation. Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison of their relative scores and relative performance on the job.
>
> An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job. *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission of the City of New York*, 360 F.Supp. 1265, 1273-74 (D.C.N.Y. 1973), *modified*, 490 F.2d 387 (2nd Cir. 1973).

See also, *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507 (D.C. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir.

1974), *cert. denied*, 421 U.S. 910 (1975); *Douglas v. Hampton, supra; Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

The Guidelines of the Equal Employment Opportunity Commission authorize the use of a content validation approach "where criterion-related validity is not feasible". 29 C.F.R. § 1607.5. Dr. O'Leary stated that criterion-related validity was not possible in the present context. Such validation was not feasible because of the lack of valid criteria for work performance, the small number of persons promoted from each eligibility list and the possibility of collusion. Predictive validation, consisting of a comparison between test scores and job performance, raises an additional problem, not mentioned by Dr. O'Leary. Defendants herein were required by law to establish a valid selection procedure. Such a duty was an immediate one. Predictive validation of necessity requires a great deal of time presumably the applicants must be given a sufficient orientation period in the jobs before their performance is analyzed against their examination scores. See *Commonwealth of Pennsylvania v. Glickman*, 370 F.Supp. 724, 732 (D.C. Pa. 1974). But defendants had the duty to establish a valid selection procedure immediately. If the predictive validation approach were used, a test would have to be constructed, persons chosen for positions on the basis of the results of that test, and at a later date, analyses of their performance made. If the test were found not to be valid, the process would have to begin again. This Court is unable to find authority for granting an employer an exemption from the requirements of the law while a validation study is underway. It is the Court's conclusion that predictive validation would not be feasible and the Court is of the opinion that a content validity approach was the only feasible approach in the present context.

While the Equal Employment Opportunity Commission Guidelines are entitled to great deference, *Albemarle Paper Co.*

v. Moody, 43 U.S.L.W. 4880 (1975), it is worth noting that the Guideline requirement that the content validity approach be used only when the other methods are not feasible has been disputed by the Courts. In *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission of the City of New York*, 360 F.Supp. 1265, 1273-74 (D.C.N.Y. 1973), *modified*, 490 F.2d 387 (2nd Cir. 1973), the experts involved were of the opinion that concurrent validation was less desirable than predictive validation "because of the possibility that some distortion may result from either the experience or lack of motivation of the current employees who participate in the examination for experimental purposes." *Id.* at 1273. See *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission of the City of New York*, 490 F.2d 387 (2nd Cir. 1973) (today's preferred method may be rejected tomorrow); *Kirkland v. The New York State Department of Correctional Services*, 374 F.Supp. 1361, 1371 (D.C. N.Y. 1974), *modified*, 520 F.2d 420 (2nd Cir. 1975) (a content-valid examination will not be set aside simply because the other methods of validation were not used). The required burden that the employer must meet is *not* one of compelling interest or lack of feasible, *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972), but simply that there is a substantial relationship between the scores and job performance.

Having found that Dr. O'Leary was justified in choosing the content validation approach, the Court must now determine if the examination is valid. In order to be valid, the content of the examination must match the content of the job. In *Vulcan Society, supra*, 490 F.2d at 396, the court stated

> If an examination has been badly prepared, the chance that it will turn out to be job-related is small. *Per contra*, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A prin-

> ciple of this sort is useful in lessening the burden of judicial examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand.

See also *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975). This Court is not holding that plaintiffs must rebut an inference created by Dr. O'Leary's qualifications. Nontheless, it is important to note that the examinations involved were the result of careful and extensive research. In many of the cases cited to this Court, such was not the case. See *e.g., Boston Chapter, NAACP, Inc. v. Beecher, supra* (the test was not professionally developed nor had there been any analysis of the required job skills); *Fowler v. Schwarzwalder*, 351 F.Supp. 721 (D.C. Minn. 1972), *rev'd on other grounds*, 498 F.2d 143 (8th Cir. 1974) (no attempt made to relate the relative importance of job duties or to correlate the same to the number of test questions; no systematic or empirical review of the elements of the job); *Kirkland v. New York State Department of Correctional Services*, 374 F.Supp. 1361, *modified*, 520 F.2d 420 (2nd Cir. 1975) (inadequate job analysis); *Western Additional Community Organization v. Alioto*, 340 F.Supp. 1351 (D.C.Cal. 1972), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir. 1975) (no job analysis performed).

To prove that an examination has content validity,

> . . . defendants must demonstrate not only that the knowledge, skills, and abilities tested for by [the examination] . . . coincide with some of the knowledge, skills and abilities required successfully to perform on the job, but also that 1) the attributes selected for examination are critical and not merely peripherally related to successful job performance; 2) the various portions of the examination are accurately weighted to reflect the relative importance to the

> job of the attributes for which they test; and 3) the level of difficulty of the examination matches the level of difficulty for the job. *Kirkland v. The New York State Department of Correctional Services*, 374 F.Supp. 1361, 1372, *modified*, 520 F.2d 420 (2nd Cir. 1975).

It is clear from the facts that Dr. O'Leary's analysis and examination comported with these requirements. The job analysis was thorough and complete. The questions were distributed among the areas of knowledge required in accordance with the importance given to the area by the persons interviewed. The Court is aware of case law indicating that "all or substantially all the critical attributes" of the job must be included in the examination. *Kirkland, supra* at 1372. Plaintiffs herein contend that the examination is invalid because certain skills, such as supervisory skills, were not included in the written examination. Nonetheless, the Court concludes that the examination was valid. Even Plaintiffs' own expert approved the use of the working test period, during which time supervisory skills could be more adequately evaluated. He also approved of the use of service ratings. The Equal Employment Opportunity Commission Guidelines themselves impliedly recognize the use of written and evaluative examinations. See 29 C.F.R. § 1607.13. Furthermore, there is support in the law for the use of non-comprehensive written examinations. See *Bridgeport Guardians, Inc., supra*. The job analysis conducted herein convinces this Court that the areas tested sufficiently identify suitable candidates for promotion. It was clear from the interviews conducted that knowledge of fire fighting and inspection were considered to be very important.

The Court further concludes that the cut-off score was validly established. The Equal Employment Opportunity Commission Guidelines require that the "cut-off score will be reasonable and consistent with normal expectations of proficiency within the work force or group . . .". 29 C.F.R. § 1607.6. It was clear

from the evidence that only a few persons from the eligibility list would be promoted. Under such circumstances, the Court can not conclude that the cut-off score was unreasonable, or inconsistent with the required criteria.

Even plaintiff's expert conceded that a perfect examination is not possible. A perfect test is a goal "as illusory as perfect schools or perfect courts . . .". *Boston Chapter NAACP, Inc., supra*, 504 F.2d at 1022. The Court concludes that the examination had content validity. This is all that the law requires of an employer. Neither a perfect examination, nor an examination without a disparate impact is a necessity, where, as here, the employer has established that the examination has been validated in accordance with recognized methods. The examination for Fire Captain meets the criteria established by law. The Court has found that there was no evidence of a disparate impact in connection with the examinations for Battalion Chief, Dejuty Chief and Fire Chief. Accordingly, the burden of establishing that those examinations were valid does not shift to the employer. See *Griggs v. Duke Power Co., supra* at 431.

The Court has found that the exclusions of blacks from the supper clubs was not the result of any actions by defendants, but instead the result of private decisions by individual fire personnel. Under such circumstances, defendants have not violated any statutory duties. Because of the tensions created by the situation, however, the Court will request that defendants do all that they can to eradicate the problem, and will allow plaintiffs to return to Court should the situation persist.

The parties are in dispute as to meaning of a certain aspect of the partial consent decree. That decree requires the St. Louis Fire Department to establish a racial composition that approximates the racial composition of the City of St. Louis as a whole. The issue disputed is whether the reference group should be the total uniformed personnel of the Fire Department (approxi-

mately 1,000 persons) or the total number of Firefighters (approximately 750 persons). It is the Corut's conclusion that the latter figure shall control. The terms of the partial consent decree provide that it shall remain in effect until, after a period of five years from date of entry, defendants move that it be dissolved.

The Court has found that the examination ior Fire Captain was properly validated as required by law. Plaintiffs failed to prove a disparate impact as the other promotional examinations. The evidence failed to establish that either George Horne or Preston Sims were denied promotion or employment because of their race. Similarly, the evidence failed to establish that the exclusion of blacks from the supper clubs were the result of any actions by defendants. Accordingly, judgment will be entered for defendants.

/s/ JOHN F. NANGLE
United States District Judge

Dated: April 9, 1976

APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. City of St. Louis, a Municipal Corporation, et al., Defendants.	Civil Action No. 74-200 C (4)
Firefighters Institute for Racial Equality, et al., Plaintiff, vs. City of St. Louis, Missouri, et al., Defendants.	Civil Action No. 74 C 30 (4)

Partial Consent Decree

The United States filed its complaint herein on March 18, 1974, alleging that the defendants were engaged in a pattern and practice of discrimination based on race in hiring for and promotion within the City of St. Louis Fire Department (known formally as the Division of Fire and Fire Prevention of the Department of Public Safety) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended by the Equal Employment Opportunity Act of 1972, Public Law 92-261 (March 24, 1972) and the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

Plaintiffs Firefighters Institute for Racial Equality, et al., consisting of FIRE and 10 named individuals filed suit on January 11, 1974, alleging *inter alia*, discriminatory practices on part of defendants in their hiring and promotion practices within the fire department of the City of St. Louis. Because of the identity of issues involved, the two cases were consolidated by the Court on March 17, 1975 with the assent of the parties.

It now appears to the Court that the parties have waived a hearing and findings of fact and conclusions of law on those issues raised by the complaint relating to the initial employment of blacks to the position of firefighter, and have agreed to the entry of this partial Consent Decree, which shall in no manner constitute findings on the merits of the case nor be construed as an admission by defendants of any violation of Title VII or of rights guaranteed by the Fourteenth Amendment, 42 U.S.C. § 1981 and 42 U.S.C. § 1983. All issues raised by the complaint with respect to the promotion of blacks and their terms and conditions of employment within the Fire Department are reserved for hearing and adjudication by this Court. Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. Inasmuch as it is a matter of policy and of law for the City of St. Louis not to engage in any act or practice which has the purpose or effect of discriminating against any employee of or any applicant or potential applicant for employment with the City of St. Louis Fire Department because of such individual's race or color, it hereby consents to the entry of an order permanently enjoining such conduct, and defendants are so ordered and enjoined. This does not constitute an adjudication or finding of discrimination against the defendant City. Also, the City maintains its denial of any act or practice of discrimination.

2. The defendants shall, as a long range goal, seek to recruit and hire blacks in sufficient numbers so as to achieve a racial composition in the ranks of Firefighters within the City of St. Louis Fire Department that is more representative of the racial

and ethnic composition of the City of St. Louis as a whole. The goal shall be to achieve a racial composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis subject to the availability of qualified applicants. In order to fulfill this goal and subject to the availability of sufficient qualified black applicants, defendants shall adopt and seek to achieve a goal of hiring blacks for at least fifty percent (50%) of the vacancies for the entry level of Firefighter personnel in the Fire Department for each year during the life of this decree. For purposes of compliance with this goal, only those blacks completing their probationary period shall be counted. In no case shall defendant be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to meet the goal.

3. The defendant City, through its officials and agents, shall take all reasonable steps consistent with its obligation to meet the goals set forth in paragraph 2 above, including contact with community organizations in the black communities, such as the Urban League and NAACP, and high schools with substantial minority enrollments, for the purpose of soliciting their help in informing minorities of employment opportunities in the fire department. The City shall also use its own resources, such as the facilities of the Personnel Department to recruit qualified minorities. Such effort on the City's part shall include announcements to radio, television, and other media directed at the black communities. The City shall also cooperate with and assist available independent programs which are aimed at recruiting minorities for the City Fire Department. The defendant City shall also utilize the services of incumbent black Firefighters in its recruiting efforts to the extent that such incumbents are willing and able to assist.

4. Defendants may make appointments from the current eligibility list for Probationary Firefighter so long as they meet

the interim goals set out in paragraph 2, but in no event beyond the expiration of 2 years from the date of establishment of the list. Those blacks on the current list who are not appointed during this interim period and those blacks who applied and completed the written and physical agility tests in the 1971 and 1974 examinations but were not placed on the eligibility list shall be informed by defendants that they are eligible for the next examination for the position of Probationary Firefighter without regard to the maximum age limitation.

5. In fulfilling the hiring goal set forth in paragraph 2 above, the defendants may use such written screening devices or alternative systems of testing together with age and physical fitness criteria now used for measuring qualifications to become a Firefighter; provided, however, that the use of any written screening device shall not be a defense for failure to meet the interim hiring goals set forth in paragraph 2 above. Residence in the City of St. Louis shall continue to be a requirement for the selection of Firefighters.

6. If the defendants wish to use written examinations for qualifying or ranking applicants for the position of Firefighter in a manner inconsistent with the goal provided in paragraph 2, any such written examination must have been found to be job-related and validated by a criterion related study in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines enunciated thereunder, including the Guidelines contained in 29 C.F.R. 1607.1, et seq., or otherwise have been shown to have no discriminatory impact. If defendants wish to utilize any such written examination, they shall furnish to plaintiffs, subject to appropriate protective orders, at least sixty days prior to any intended use, evidence of the absence of adverse impact and/or a copy of the validation study, and any other relevant information concerning the test and its validity. If the parties agree that the test has no adverse impact or has been validated in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines thereunder, defendants

may thereafter utilize the test. If the parties disagree, the examination shall not be utilized unless and until the Court determines upon motion and such evidentiary hearing as it deems appropriate that the test has no adverse impact, or that it has been validated in accordance with Title VII as amended, and the Guidelines thereunder.

7. Defendants shall retain for a period of five years all records relating to the recruitment, selection and appointment of persons for the position of firefighter, including applications submitted by all applicants, identified by race, all medical and background investigation files, evaluations of applicants, eligibility lists and requisition forms with persons identified by race. Defendants shall also retain for a period of five years all records relating to performance in the firefighter training program and during the probationary period, including a statement in detail of the reasons for termination of any individual during training or during his probationary period. The plaintiffs' attorneys shall have the right to inspect and copy any or all such documents subject to appropriate protective orders upon reasonable notice to defendants without further order of the Court. In addition, defendants shall furnish the plaintiffs with such information or records as they may request in writing, provided that such requests shall not be unduly burdensome and that plaintiff pay all reasonable costs incurred in furnishing such information and records.

8. For purposes of this Decree, a reporting period shall run from July 1 through December 31 and from January 1 through June 30 for each year. The first reporting period shall begin on July 1, 1975. Within thirty days after the close of each reporting period, defendants shall submit to the plaintiffs a written report (covering the preceding reporting period) containing the following information:

(a) The name, address, telephone number, date of appointment and race of each person appointed to the position of firefighter.

(b) The number of persons, identified by race, disqualified for appointment to the position of firefighter, classified by reason for disqualification.

(c) The name, address, telephone number, date of termination, and race of each person who was terminated or who resigned from the fire department prior to the completion of probation.

(d) The total number by race and rank of uniformed personnel on the Fire Department as of the close of the reporting period.

(e) A racially-identified copy of any eligibility list for Firefighter established during that reporting period.

9. In case of conflict between the terms of this Decree and the Statutes of the State of Missouri, any rules or regulations of the Civil Service Commission, or any charter or ordinances of the City of St. Louis respecting the employment or employees of the fire department, the terms of this Decree shall prevail.

10. At any time after five (5) years from the date of entry of this partial decree, defendants may move this Court on forty-five (45) days notice to plaintiffs for dissolution of this partial decree; and upon their showing that the goals of this decree in providing equal employment opportunities have been fully achieved, the decree may be dissolved.

It Is Further Ordered, Adjudged, and Decreed that defendants shall have judgment against plaintiffs on all remaining issues in these causes.

It Is Further Ordered, Adjudged, and Decreed that each party shall bear its own costs herein.

/s/ JOHN F. NANGLE
United States District Judge

Dated: June 28, 1976

APPENDIX II

United States District Court, Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 74-200 C (4)
Firefighters Institute for Racial Equality, et al., Plaintiffs, vs. City of St. Louis, et al., Defendants.	No. 74-30 C (4)

NUNC PRO TUNC ORDER

(Filed June 28, 1976)

It Is Hereby Ordered that paragraph 19 of the memorandum filed herein on April 9, 1976 be and is deleted and there be substituted in lieu thereof the following:

> 19. With regard to entry level positions, the parties stipulated with the consent of the Court that the terms contained in Appendix A (Partial Consent Decree) would be observed by the parties pending final decision by this Court and would be incorporated in the final decree herein.
> 19a. The statistical evidence adduced establishes that the entry level examination had a disparate impact upon black applicants. Defendants have come forward with no evi-

dence of validation tending to show that this examination is related to job performance.

It Is Further Ordered that the first paragraph on page 26 of the memorandum commencing with the words "The parties are in dispute . . ." be and is deleted and there be substituted in lieu thereof the following:

The statistical evidence established that the entry level examination had an adverse impact upon black applicants. Defendants have presented nc evidence of validation. Absent such evidence, the examination may not be used to preclude appointment to entry level positions. See *Griggs v. Duke Power Co., supra; Boston Chapter, NAACP, Inc. v. Beecher, supra.* Accordingly, relief will be granted plaintiffs.

It Is Further Ordered that the Order of this Court filed on April 9, 1976 be and is deleted and there be substituted in lieu thereof the following order:

Pursuant to the memorandum filed this date,

It Is Hereby Ordered, Adjudged, and Decreed that, pursuant to the stipulation of the parties,

1. The defendants shall, as a long range goal, seek to recruit and hire blacks in sufficient numbers so as to achieve a racial composition in the ranks of Firefighters within the City of St. Louis Fire Department that is more representative of the racial and ethnic composition of the City of St. Louis as a whole. The goal shall be to achieve a racial composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis subject to the availability of qualified applicants. In order to fulfill this goal and subject to the availability of sufficient qualified black applicants,

defendants shall adopt and seek to achieve a goal of hiring blacks for at least fifty percent (50%) of the vacancies for the entry level of Firefighters personnel in the Fire Department for each year during the life of this decree. For purposes of compliance with this goal, only those blacks completing their probationary period shall be counted. In no case shall defendants be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to meet the goal.

2. The defendant City, through its officials and agents shall take all reasonable steps consistent with its obligation to meet the goals set forth in paragraph 1 above, including contact with community organizations in the black communities, such as the Urban League and NAACP, and high schools with substantial minority enrollments, for the purpose of soliciting their help in informing minorities of employment opportunities in the fire department. The City shall also use its own resources, such as the facilities of the Personnel Department to recruit qualified minorities. Such effort on the City's part shall include announcements to radio, television, and other media directed at the black communities. The City shall also cooperate with and assist available independent programs which are aimed at recruiting minorities for the City Fire Department. The defendant City shall also utilize the services of incumbent black Firefighters in its recruiting efforts to the extent that such incumbents are willing and able to assist.

3. Defendants may make appointments from the current eligibility list for Probationary Firefighter so long as they meet the interim goals set out in paragraph 1, but in no event beyond the expiration of 2 years from the date of establishment of the list. Those blacks on the current list who are not appointed during this interim period and those blacks who applied and completed the written and physical

agility tests in the 1971 and 1974 examinations but were not placed on the eligibility list shall be informed by defendants that they are eligible for the next examination for the position of Probationary Firefighter without regard to the maximum age limitation.

4. In fulfilling the hiring goal set forth in paragraph 1 above, the defendants may use such written screening devices or alternative systems of testing together with age and physical fitness criteria now used for measuring qualifications to become a Firefighter; provided, however, that the use of any written screening device shall not be a defense for failure to meet the interim hiring goals set forth in paragraph 1 above. Residence in the City of St. Louis shall continue to be a requirement for the selection of Firefighters.

5. If the defendants wish to use written examinations for qualifying or ranking applicants for the position of Firefighter in a manner inconsistent with the goal provided in paragraph 1, any such written examination must have been found to be job-related and validated by a criterion related study in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines enunciated thereunder, including the Guidelines contained in 29 C.F.R. 1607.1, et seq., or otherwise have been shown to have no discriminatory impact. If defendants wish to utilize any such written examination, they shall furnish to plaintiffs, subject to appropriate protective orders, at least sixty days prior to any intended use, evidence of the absence of adverse impact and/or a copy of the validation study, and any other relevant information concerning the test and its validity. If the parties agree that the test has no adverse impact or has been validated in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines thereunder, defendants may thereafter utilize the test.

If the parties disagree, the examination shall not be utilized unless and until the Court determines upon motion and such evidentiary hearing as it deems appropriate that the test has no adverse impact, or that it has been validated in accordance with Title VII, as amended, and the Guidelines thereunder.

6. Defendants shall retain for a period of five years all records pertaining to the recruitment, selection and appointment of persons for the position of Firefighter, including applications submitted by all applicants, identified by race, all medical and background investigation files, evaluations of applicants, eligibility lists and requisition forms with persons identified by race. Defendants shall also retain for a period of five years all records relating to performance in the firefighter training program and during the probationary period, including a statement in detail of the reasons for termination of any individual during training or during his probationary period. The plaintiffs' attorneys shall have the right to inspect and copy any or all such documents subject to appropriate protective orders upon reasonable notice to defendants without further order of the Court. In addition, defendants shall furnish the plaintiffs with such information or records as they may request in writing, provided that such requests shall not be unduly burdensome and that plaintiffs pay all reasonable costs incurred in furnishing such information and records.

7. For purposes of this Decree, a reporting period shall run from July 1 through December 31 and from January 1 through June 30 for each year. The first reporting period shall begin on July 1, 1975. Within thirty days after the close of each reporting period, defendants shall submit to the plaintiffs a written report (covering the pre-

ceding reporting period) containing the following information:

(a) The name, address, telephone number, date of appointment and race of each person appointed to the position of Firefighter.

(b) The number of persons, identified by race, disqualified for appointment to the position of Firefighter, classified by reason for disqualification.

(c) The name, address, telephone number, date of termination, and race of each person who was terminated or who resigned from the fire department prior to the completion of probation.

(d) The total number by race and rank of uniformed personnel on the Fire Department as of the close of the reporting period.

(e) A racially-identified copy of any eligibility list for Firefighter established during that reporting period.

8. In case of conflict between the terms of this Decree and the Statutes of the State of Missouri, any rules or regulations of the Civil Service Commission, or any charter or ordinances of the City of St. Louis respecting the employment or employees of the fire department, the terms of this Decree shall prevail.

9. At any time after five (5) years from the date of entry of this partial decree, defendants may move this Court on forty-five (45) days notice to plaintiffs for dissolution of this partial decree; and upon their showing that the goals of this decree in providing equal employment opportunities have been fully achieved, the decree may be dissolved.

It Is Further Ordered, Adjudged, and Decreed that defendants shall have judgment against plaintiffs on all remaining issues in these causes.

It Is Further Ordered, Adjudged, and Decreed that each party shall bear its own costs herein.

/s/ JOHN F. NANGLE
United States District Judge

Dated: June 28, 1976

APPENDIX III

United States Court of Appeals
for the Eighth Circuit

Nos. 76-1507 and 76-1663

Firefighters Institute for Racial Equality, et al.,
Plaintiff-Appellants,
v.
City of St. Louis, et al.,
Defendants-Appellees,

United States of America,
Plaintiff-Appellant,
v.
City of St. Louis, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 14, 1976

Filed: February 2, 1977

Before Lay, Ross and Stephenson, Circuit Judges.

Ross, Circuit Judge.

In this consolidated action, black firefighters and the Department of Justice allege the existence of racially discriminatory

practices in the St. Louis City Fire Department. In the first action the Firefighters Institute for Racial Equality (F.I.R.E.) and several named plaintiffs represent a class who are presently employees or who seek employment with the St. Louis Fire Department. The United States subsequently filed suit under Title VII of the Civil Rights Acts of 1964 seeking redress for a "pattern or practice" of discrimination as well as for individuals not represented by F.I.R.E. Both actions were filed pursuant to 42 U.S.C. §§ 1981, 1983 and 2000e *et seq.* The principal defendant, the City of St. Louis is joined in its argument by the Intervenors who represent a class of nonblack employees and candidates for employment in the fire department.

Appeal is taken on a number of issues, but no appeal has been taken with respect to the examination for *firefighter* which is the *entry level* position in the fire department.[1] The F.I.R.E. Appellants do contest the City's promotional practices with regard to the fire captain's exam and the battalion chief's exam. Also charged as unlawful are exclusion of blacks from firehouse eating arrangements known as "supper clubs," and the failure to promote a black individual, George Horne, to a fire captain position. F.I.R.E. also contests the amount of attorney's fees which the district court indicated it would award.

Of these issues, the United States appeals on only two: the promotional exam for *fire captain* and the supper club discrimination issue. This court considers the latter as the principal claims, and reverses with respect to them. The district court is affirmed with respect to the battalion chief exam and in the matter of George Horne.

---

[1] The *firefighter* exam was shown to have had a disparate racial effect and was not validated. *See* nunc pro tunc order 2 (June 28, 1976). The order was entered on June 28 and amended the April 9, 1976 memorandum opinion which had included the parties partial consent decree on the entry level issue. On June 28 the court issued an order pursuant to the stipulation of the parties granting relief similar to the partial consent decree. The June 28 order required defendants *inter alia* to try to achieve a 50 percent hiring rate for blacks in filling vacancies at the entry level over the next five years.

Fire Captain's Examination

The position of fire captain is the first level supervisory job in the St. Louis Fire Department. According to the findings of the district court, fire captains are responsible for the supervision of a group of men and equipment on a particular work shift. The in-service training of the firefighters under his command is a significant part of the fire captain's job. According to the City's validation study, the fire captain leads his company at the fire scene.

Promotion to the fire captain's position is dependent on a composite score developed from three measurements of an individual's qualifications. For candidates on the 1974 eligibility list which is at issue here, the "written test" was given a 45 percent weight as was an "experience and training score." The "service rating" score was weighted as 10 percent of the composite.

Attaining the rank of fire captain is a highly sought-after and competitive goal of both blacks and whites. From the 1974 procedure now under scrutiny a total of 453 persons are seeking the higher position of captain, while only approximately 18 persons are needed to fill vacancies during the two-year life of the eligibility list. The highest ranking black man ranks as number 55 out of a total of 189 on the list. As a prerequisite for consideration all applicants for fire captain must have served five years as a firefighter.[2]

The experience and training score, which comprised 45 percent of the total score, is also a function of *length* of service with the fire department. According to the district court, points

---

[2] F.I.R.E. has alleged that the change of the in-service requirement from five to seven years from 1967 up until 1974, when it was changed back to five years, adversely affected black applicants. However, the change, which was instituted both times on the recommendations of consultants, admittedly affected white candidates as well as black.

are awarded for each month of experience with the department. In 1974 all applicants with ten or more years experience received the maximum score of 45 points. Eighty-one percent of those who made the 1974 eligibility list for the captain's position received the maximum number of points for experience and training.

While the experience and training score is largely quantitative, the "service rating" is qualitative, and reflects the individual's last supervisory rating prior to announcement of the written exam. On this measurement of qualification, 93 percent of the persons on the eligibility list received scores in the narrow range between 7.8 and 9.2.

At trial Dr. O'Leary, the City's test analyst and expert witness, testified that these two work-related ratings were included because he felt that experience on the job and the quality of that experience were important factors in evaluating potential fire captains.[3]

It appears that as a practical matter these two scores carry less weight than their assigned value indicates. For many of those 189 persons who made the eligibility list, these two experienced-based scores are closely clustered, making the written exam of much greater weight in determining final rank than the allotted weight of 45 percent.

It is not disputed here that the 1974 written exam for the fire captain's position adversely affected black candidates as a

---

[3] Dr. O'Leary also testified that determining the relative *weight* of the three scores was a matter of judgment and he knew of no mathematical or statistical procedure to objectively determine the weight to be accorded each criteria. This opinion was refuted to a certain extent by the plaintiff's expert, Dr. Barrett, who indicated that weighting is best arrived at by some empirical means such as a criterion-related validity study. In any event, it has not been argued on this appeal that the use of an experience and training score or a service score has resulted in a discriminatory impact on black candidates.

whole. The district court concluded that [illegible]tistical evidence presented established that the test had a [illegible]arate impact on blacks.[4]

It is a distinguishing feature of a Title VII cause of action that discriminatory impact suffices to establish a prima facie showing of discrimination. The recent case of *Washington v. Davis*, 426 U.S. 229, 239 (1976), establishes that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. However, Congress' statutory standard for Title VII, where discriminatory purpose need not be proved, is unshaken by the *Washington* decision. *Id.* at 246-47.[5]

It is now a familiar principle that Title VII was not meant to preclude the use of testing devices, and that what is bidden is the controlling use of such tests "unless they are demonstrably a reasonable measure of job performance." *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

Once a racially adverse impact is demonstrated, the burden of proof shifts to the employer to prove the job relatedness of the exam he has utilized. *Albemarle Paper Co. v. Moody*, 422

---

[4] The mean score for blacks on this exam was 69.72; the mean for whites was 76.59. Of those blacks taking the exam 25.5 percent received a passing score; 43.6 percent of the whites passed.

[5] In 1972 Congress amended 42 U.S.C. § 2000e and included state and local governments, such as the City of St. Louis, under the rubric of "employers" subject to that Act. Intervenors in this appeal, citing *National League of Cities v. Usery*, 44 U.S.L.W. 4974 (June 24, 1976) have strongly contested Congress' power to dispense with the *intent* requirement in Title VII cases where state and local governments act as employers. The *Cities* case, *supra*, limiting Congress' power to impose wage and hour standards for state and local employees under the commerce clause, is undoubtedly inapposite. *But see Fitzpatrick v. Bitzer*, 44 U.S.L.W. 5120 (June 28, 1976). In any event, the court determines that it need not reach this issue. Counsel for the Intervenors has admitted under the court's questioning that the constitutional issue was not raised below.

U.S. 405, 425 (1975). Accepted professional methods of "validating" exams for their job-relatedness are found in the EEOC Guidelines published in 29 C.F.R. § 1607.5 (1975). The Supreme Court has said of these test validation techniques:

> The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." (Citations omitted).

Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431.

Though it has been argued here that the EEOC Guidelines, which refer to the standards of the American Psychological Association (APA), should be considered "guidelines *only*" these standards have often been sanctioned as a means by which courts may professionally evaluate the validity of employment tests when called upon to do so.[6]

It is also true that in this case Dr. O'Leary, the City's expert who developed and validated the test, purportedly considered and reviewed the APA and EEOC publications as guidelines in preparing the examination.

Accepted validation techniques under these standards include two forms of criterion-related validity, plus the content and construct validity methods. Criterion-related studies involve the correlation of job performance with success on an examination.

---

[6] *See, e.g., Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975): "These guidelines have been cited with approval by the Supreme Court, followed by all courts dealing with these issues, and recognized as controlling in at least one circuit. We think it unwise to depart from these accepted principles at this stage in the development of the law concerning equal employment opportunity." *Id.* at 986 (footnote omitted). *See also, Kirkland v. New York St. Dept. of Correctional Serv.*, 520 F.2d 420, 426 (2d Cir. 1975); *Vulcan Soc'y of New York City Fire Dept., Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265, 1273 n.23 (S.D.N.Y. 1973).

Predictive validation requires a comparison between an applicant's test scores and subsequent on-the-job performance as an employee; *concurrent* validation methods correlate the test scores of *present* employees vis-a-vis their *present* job performance. *Vulcan Society of New York City Fire Dept. v. Civil Service Commission*, 490 F.2d 387, 394 (2d Cir. 1973). These empirical methods are, of course, dependent on statistical correlations as proof of reliability and validity. Content validity, the technique chosen by Dr. O'Leary for justification of the fire captain's exam, generally requires that the examination reflect a representative sample of the knowledge or behavior that will be used in performance of the job.

The F.I.R.E.-Appellants have argued on this appeal that a *content* validity study should not have been undertaken by the City and that this type of test should be used *only* when a criterion-related study has proved to be technically infeasible.[7] This argument is now undermined by the Supreme Court's recent observation in *Washington v. Davis*, 426 U.S. 229 (1976), that "[i]t appears beyond doubt by now that there is no *single* method for appropriately validating employment tests for their relationship to job performance." *Id.* at 247 n.13 (emphasis added).[8] Although in this court's opinion content validation, *if properly done*, could be an acceptable means of evaluation for the City to undertake, it is no more acceptable than a criterion-related test, especially if such criterion-related test involves concurrent validation testing methods with present fire captains.

Constructing a content valid exam and proof of its validity requires as a first step a thorough analysis of the job to be

---

[7] *See* 29 C.F.R. § 1607.5(a) (1975).

[8] Newly proposed regulations provide that "[f]or the purposes of satisfying these guidelines users may rely upon criterion related validity studies, content validity studies, or construct validity studies * * *." 41 Fed. Reg. 29018 (1976).

performed. The district court concluded, and this court does not challenge the finding, that Dr. O'Leary's analysis of the fire captain's job was thorough and complete.[9]

It is in fact the fatal flaw in the validation study that the test Dr. O'Leary devised did not reflect his findings in the job analysis. The captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability. From the interviews conducted for the job analaysis, the City's expert determined that almost 43 percent of a fire captain's time was spent in supervision, a higher percentage of time than on any other single element. Of the six tasks ranked as the "most important," supervision was fourth. There was no attempt to test supervisory skills prior to selecting the new captains. The City admits this lack of proper testing for supervisory ability but claims the best method of doing it, through an Assessment Center approach, is too expensive.

---

[9] Twenty-seven fire captains were interviewed in the preparation of this job analysis. Those interviewed were asked to describe the elements of the job and rank their relative importance. Captains were questioned concerning the positive and negative critical incidents of the job, and the essential and desirable qualities of a fire captain.

A pool of questions for the exam were obtained through the International Governmental Personnel Management Association; according to Dr. O'Leary, a series of items tailor-made by the department were also included. Questions on the exam were distributed according to the importance of each area of knowledge. The best items were selected after review by several technical and test advisors. *See United States v. City of St. Louis*, 410 F.Supp. 948, 954 (E.D. Mo. 1976).

Dr. Barrett's main objection to the job analysis was that in his opinion the descriptions of job activities and skill levels were incomplete. He also acknowledged, however, that the 27-person sample, interview technique, and cataloging of information used by Dr. O'Leary were reasonable methods. Considering the district court's evaluation of the two experts' credibility, this court will not disturb the lower court's conclusions about the *job analysis*. Compare the job analysis in this case with the cursory preparation disapproved in *Vulcan Soc'y of New York City Fire Dept., Inc. v. Civil Serv. Comm'n, supra*, 360 F.Supp. at 1275.

The EEOC Guidelines accept evidence of content validity for tests "that consist of suitable samples of the *essential* knowledge, skills or behaviors composing the job in question." 29 C.F.R. § 1607.5(a) (1975) (emphasis added). Similarly, the APA Standards, which the EEOC Guidelines refer the reader to, clearly warn that:

> An employer cannot justify an employment test on grounds of content validity if he cannot demonstrate that the content universe includes *all, or nearly all,* important parts of the job.

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 29 (1974) (emphasis added).

It is clear that this court's objection to this test is similar to the objections of other courts. In a decision where Blacks and Hispanics challenged the *content* validity of a correction officer's exam, the court also questioned the test's lack of comprehensiveness:

> More serious perhaps than specific item flaws is the fact that, regardless whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witnesses for both sides singled out as important to the Sergeant job. Among these are leadership, understanding of inmate resocialization, ability to empathize with persons from different backgrounds, and ability to cope with crisis situations.

Kirkland v. New York State Dept. of Correctional Services, 374 F.Supp. 1361, 1378 (S.D.N.Y. 1974), *aff'd in relevant part,* 520 F.2d 420 (2d Cir. 1975). In *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission, supra,* 360 F.Supp. at 1274, *aff'd,* 490 F.2d 387 (2d Cir. 1973), the court quite simply stated: "[a]n examination has content

validity if the content of the examination matches the content of the job.[10] Though the district court was "convinced" from the *job analysis* that the "areas tested sufficiently identify suitable candidates for promotion," it is this court's opinion that an erroneous legal standard was applied in reaching that conclusion. The job analysis here may have appeared impressive in relation to those challenged in other cases, but a good analysis in any situation is of little use when the examination fails to reflect what is found in the job analysis. The test is not *content* valid. In short, even a common sense concept of content validity, aside from EEOC and APA Standards, requires that an important and distinguishing attribute be tested in some manner to find the best qualified applicants. Here, where the exam failed to test a job component compirsing over 40 percent of the employee's time, the inference of discrimination has not been rebutted with a finding of the exam's "job-relatedness."

Both experts agree that there is no good pen and paper test for evaluating supervisory skills. In his validation study Dr. O'Leary had anticipated that supervisory ability would be judged after an employee had been selected and placed on the job through the use of a "six months working test period." According to the validation study, the individual's supervisory abilities would be "closely scrutinized" and his performance evaluated on a pass/fail basis. Whatever merit this idea may have as a means of eliminating unfit employees after they are

---

[10] The court continued: "It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F.Supp. at 1274. *See also Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975). " 'Content' validity is established when the content of the test *closely approximates* the tasks to be performed on the job by the applicant." *Id.* at 984 (emphasis added) (footnote omitted). *See also Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1338 (2d Cir. 1973). Dr. O'Leary said at trial: "Content validity is validity demonstrated when one can show that the content of his predictors * * * are *very close* to the content of the job that the person is going to be performing." (Emphasis added).

chosen, it cannot substitute for a valid selection method utilized at the outset to fairly pick the best employees in a nondiscriminatory manner. The many who are not picked for the "working test period" obviously have no opportunity to compete or to raise their rank by a demonstration of their ability. Significantly, the City's director of personnel testified that though the working test portion has "always existed" he did not know whether a fire captain had ever been eliminated because of his performance during that period. Used in this manner, the probationary period would prove even less valuable as a means of selection.

Both experts also testified at trial concerning an excellent method of supervisory evaluation known as the Assessment Center technique. Dr. O'Leary had himself used it for the deputy and fire chief examination in St. Louis, labeling it as "one of the most effective methods" available. He described the Assessment Center as a selection procedure which uses individual and group exercises that simulate job responsibilities while assessors evaluate a candidate's performance. The Assessment Center was apparently rejected for choosing fire captains because of the large number of persons who wish to take that test. The evidence indicates that the assessment technique takes at least one day and costs as much as $500 per person.

Dr. Barrett, who is enthusiastic about this approach as well, has suggested a means for reducing the expense through the use of a content valid screening test. As the court understands his testimony, the written test would be a screening device *only*, eliminating those persons who obviously did not possess the requisite job knowledge to perform at the captain's level. The Assessment Center could then be used to *rank* those persons who successfully complete the written exam. Dr. Barrett, however, also testified that this cutoff score would need to be relatively low. As Dr. Barrett testified, another possible screening device is performance ratings given from the lower level job.

This court clearly does not have enough evidence in the record or testing expertise to devise a complete remedy for testing supervisory skills using the Assessment Center or any other method. Other courts have dealt with the problem and in similar causes of action concerning invalid exams have directed "executive or administrative officials to live up to their responsibilities and to prepare and conduct an examination consonant with the Fourteenth Amendment." *Vulcan Society of New York City Fire Dept., Inc. v. Civil Service Commission, supra*, 360 F.Supp. at 1278.

Other courts have also dealt with the necessity of testing *supervisory* skill where that attribute was critical. In affirming the district court's rejection of New York City's exam for school principals, the court of appeals said:

> The [district] judge did not outlaw other written examinations or indicate that none could be created to test more fairly the qualities necessary for a supervisory job. It may well be that new testing procedures will be devised by the parties themselves and be approved by the district court.

Chance v. Board of Examiners, 458 F.2d 1167, 1179 (2d Cir. 1972) (footnotes omitted).

This court will take the same general approach of urging the parties on remand to devise a test of supervisory skills to be approved by the district court. The one caveat is that the final test *must be validated* in accordance with the published EEOC Guidelines. This may be accomplished by devising a content valid test or by a concurrent criterion-related validity test. The Assessment Center is a concededly good device, but the court will not at this point *require* that approach to be the sole method finally used. Whatever test is used should provide equal reliability and validity. Because of the difficulty of devising a test properly reflecting the supervisory skills of the applicants, it is

possible that a criterion-related concurrent validation test coupled with a limited use of the Assessment Center would meet the guidelines. Cost to the City is one factor which may be considered in deciding whether to use the Assessment Center technique,[11] but it may not be the sole deciding factor.

The district court shall have continuing jurisdiction until a valid exam is devised by the parties to these cases, if possible, and may require reports or take evidence on testing procedures as it deems necessary. The final plan will be subject to that court's approval.

Both appellants also argue that the test has a number of "flawed items" which invalidate the written exam even for the areas of job knowledge it has attempted to cover. At trial Dr. Barrett had criticized many of the individual questions that were used on the test.[12] Though Dr. Barrett gave examples of each of his specific criticisms, his testimony does not render the trial court clearly erroneous. When asked if each item on a test had to be valid in order for the whole test to be valid, he replied that it did not. He previously admitted not having made a study of the entire fire captain's exam to determine the *total* number of poor and unrelated questions. This Court agrees that some improvement could be made in this area.

---

[12] Dr. Barrett objected to "tenuous linkage" in some questions; questions where a correct answer did not guarantee adequate performance on the job; and questions that gave a premium to the test-wise individual. Other items, he said, called for "esoteric information" not related to job performance.

[11] If a screening device is used in conjunction with Assessment Center, development of a fair cutoff score is obviously important. The EEOC Guidelines provide:

> It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

29 C.F.R. § 1607.6 (1975).

Supper Clubs

The second principal claim concerns the exclusion of blacks from the "supper clubs." Supper clubs are informal eating arrangements among on-duty firefighters at firehouses in the St. Louis Fire Department. Cooking facilities, stove, refrigerator, and cabinets for storage, are provided by the City for the use of its on-duty personnel. Each supper club provides for its own utensils and condiments and buys food for the shared meals. A cook is chosen, who the district court found, "has the discretion and authority to determine who is a member of the club." The clubs are not organized or regulated by the Fire Department.

As a finding of fact the district court concluded that blacks have been excluded from many of these clubs. These exclusions, the court found, *frequently* result in blacks, where a minority in a firehouse, cooking and eating apart from their white associates.

The district court felt that such segregation was "offensive" and "incomprehensible" but concluded that because no Fire Department directive or order promoted the exclusivity, the court would not intervene. The district court did indicate that if the problem persisted it would seek a solution.

The existence of segregated supper clubs was accepted as a fact by the district court and that fact is accepted here. This court as well finds the exclusion of black co-workers by whites highly offensive, and regards the situation as one which the Fire Department could remedy by appropriate regulations.

In *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the court in determining that the Commission possessed "the statutory authority to investigate psychological fringes in an employment relationship," discussed the scope of Title VII's authority to alleviate race discrimination:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. * * *
>
> * * * * * * *
>
> * * * Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psyhocological stability of minority group workers., and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

See also Wilson v. Woodward Iron Co., 362 F.Supp. 886, 896 (N.D. Ala. 1973). The language in *Rogers* is apposite to the situation in this case.

The City provides the cooking facilities in each firehouse for use by its on-duty personnel as part of their employment; it is clear that city officials have been made aware of the segregated eating arrangements in the firehouses for sometime and have protested their inability to solve the problem to the district court.

On remand of this case to the district court, that court should renew the interest it had indicated it had in an ongoing review of the supper club problem by supervising the Department's promulgation of new regulations. Those regulations should provide that use of city facilities by supper clubs may not continue in a discriminatory and segregated manner. In other words the supper clubs may not use City kitchen facilities if they refuse membership to blacks. In this way the City may comport with its duty to provide a non-discriminatory working environment; additionally, the inclusion of blacks and the reduction of racial tension in firehouses cannot help but aid the City as an employer where the job at hand requires the close cooperation of its employees and a concerted team effort.

Battalion Chief's Exam and the Matter of George Horne

The F.I.R.E.-Appellants have appealed the district court's decision that a prima facie case of racial discrimination was not shown with respect to the use of the battalion chief's examination. We affirm. It is undisputed that results from the *exam* showed no disparate racial impact. Two of the three blacks who took the examination passed it and at least one will be appointed to the higher level supervisory position. F.I.R.E. argues, however, that a comparison of the racial composition of the employment *pool* with the lack of black battalion chiefs clearly suffices for a prima facie showing of racial discrimination. This argument is rejected. In *Carter v. Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971), this court held that demo-

graphical "[s]tatistical evidence can make a prima facie case of discrimination" in a situation where an all white 535 man Fire Department operated in a large city with a 6.44 percent black population. In St. Louis, eleven percent of the *existing* force is black, and blacks will be hired at a 50 percent rate on the entry level pursuant to the district court's order.

In the case on which F.I.R.E. makes its primary claim for support, the court used census figures to *supplement* "meager exam statistics" which *had* shown a racial disparity. *See Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1020 (1st Cir. 1974). This is obviously not the case here.

Likewise, the district court is affirmed in the matter of George Horne. The district court found that a *union official* had written a letter to Mr. Horne in which he told him that six vacancies would be available. The district court also found that a Deputy Chief had told Horne he would speak to the Fire Chief concerning a promotion. However, only four new fire captains were requisitioned by the Fire Department at that time, eliminating Horne from consideration prior to the expiration of the eligibility list.

F.I.R.E. points to no evidence which suggests that racial discrimination was the Department's motive in making a request for four new captains. In fact, George Horne was sixth on the eligibility list, and a white man who was fifth and would precede Horne was also passed over for promotion.

As a final matter, St. Louis has raised the issue of whether or not the district court erred in not dismissing the suit brought by the United States under 42 U.S.C. §§ 2000e-5(f) and 2000e-6 (b). It is the City's contention that the United States could only participate in this suit as an intervenor; that to bring their own suit is duplicative and contrary to the intent of the statute. The United States argues that St. Louis is precluded from raising this issue because of failure to cross-appeal; that the suit

by the United States is brought on the basis of 47 charges filed with the EEOC, 30 of which were not included in the F.I.R.E. complaint; that the United States also proceeded under the pattern and practice authority of § 200e-6 on behalf of the "public interest" and accordingly, presents policy considerations different from those presented by private litigants; and finally that the consolidation of the cases provides an equivalent practical effect.

We agree with each of the reasons advanced by the United States (with the exception of the second reason), and, in view of the consolidation of the cases for trial, and the fact that F.I.R.E. raised the same questions as the United States on appeal, we do not consider our determination to be in conflict with *EEOC v. Missouri Pacific Railroad Co.*, 493 F.2d 71 (8th Cir. 1974).

A question is also raised concerning the jurisdiction of the district court to enter its nunc pro tunc order of June 28, 1976.[14] Without passing on this question we direct that at the time the district court reassumes jurisdiction of the cases on remand, it should reenter its order as of that date.

Also at that time the district court shoulld award appropriate attorney's fees to F.I.R.E. for work prior to this appeal. The court had previously indicated it was without jurisdiction to do so after an appeal was taken. Attorney's fees under Title VII may be awarded pursuant to 42 U.S.C. § 2000e-5(k). The fees awarded in this case, both on remand and upon completion of the balance of the case, should be in a fair and reasonable amount in accordance with twelve guidelines set by the court in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In our opinion the award of $3,000 suggested

---

[14] *See* note 1, *supra*.

by the trial court is grossly inadequate under these guidelines for work done prior to appeal.

Accordingly, the judgment of the district court is affirmed in part, and reversed and remanded in part for further proceedings consistent with the views expressed in this opinion. Attorney's fees for this appeal will be awarded to F.I.R.E. upon submission of affidavits relating to the guidelines described in *Johnson v. Georgia Highway Express, Inc., supra.* 488 F.2d 714.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX IV

United States Court of Appeals
for the Eighth Circuit

Septemberm Term, 1976

76-1507 Firefighters Institute of Racial Equality, etc., et al., Appellants. vs. The City of St. Louis, Missouri, etc., et al., Appellees. 76-1663 United States of America, Appellant, vs. The City of St. Louis, Missouri, etc., et al., Appellees.	Appeals from the United States District Court for the Eastern District of Missouri.

Petition of appellees for rehearing filed in these appeals having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 25, 1977

see

76

1502